MEMORANDUM

State of Alaska
Department of Law

To: The Honorable Loren Leman
Lieutenant Governor

Date: July 1, 2005

File No.: 663-05-0225

Tel. No.: 269-6612

From:
Brenda B. Page
Assistant Attorney General
Labor and State Affairs – Anchorage

Re: Review of Initiative Application to Limit Legislative Session to 90 Days

I. INTRODUCTION AND SUMMARY:

You have asked us to review an application for an initiative petition entitled "An Act relating to a 90-day regular session of the legislature; and providing for an effective date." We have completed our review. Although we believe that there is a question as to whether the initiative complies with the constitutional provisions governing use of the initiative, given the recent decision by the Alaska Supreme Court in *State v. Trust the People,* 2005 WL 1297915 (Alaska May 27, 2005), we believe that this issue is more appropriately addressed post-election. Under these circumstances, we recommend that you certify the application.

II. SUMMARY OF THE PROPOSED BILL AND ANALYSIS:

A. SUMMARY

The bill proposed by this initiative is comprised of two sections. Section one of the bill proposes to amend AS 24.05.150, which sets forth certain procedures for adjournment of the legislature, to add a new subsection as follows: "The legislature shall adjourn from a regular session within 90 consecutive calendar days, including the day the legislature first convenes in that regular session." Section two of the bill contains an effective date provision, providing that the act takes effect on the first day of the second regular session of the 25th Alaska Legislature.

The initiative is offered in the form of a statutory amendment rather than as a constitutional amendment. The Alaska Constitution currently contains a provision that addresses the length of the regular legislative session, specifically providing that:

> The legislature shall adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes
> ...

Alaska Const., art. II, sec. 8.

B. ANALYSIS

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either "certify it or notify the initiative committee of the grounds for denial." The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080.

1. The Form of the Application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

> The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

The application meets the first three requirements. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

2. The Form of the Proposed Bill

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, "Be it enacted by the People of the State of Alaska"; and (4) the bill not include subjects restricted by AS 15.45.010. The restricted subjects in AS 15.45.010 -- dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – also are listed in article XI, section 7 of the Alaska Constitution.

In addition to these specific subjects, a constitutional amendment also is a prohibited subject for an initiative. In defining the permissible scope of initiatives, the Alaska Constitution provides that "the people may propose and enact *laws* by the initiative ...." Alaska Const., art. XI, sec. 1 (emphasis added). In addition, under the general provision concerning "Law-Making Power," the constitution provides that "[u]nless clearly inapplicable, *the law-making powers* assigned to the legislature may be exercised by the people through the initiative, subject to the limitations of Article XI." Alaska Const., art. XII, sec. 11 (emphasis added).

In drafting these sections, the framers of the Alaska Constitution specifically considered and rejected the use of initiatives for constitutional amendments. 2 *Proceedings of the Alaska Constitutional Convention* 1270-73 (Jan. 5, 1956). Therefore, the constitution can only be amended by the actions of the legislature and people in concert or by a constitutional convention as set forth in art. XIII. Neither the legislature nor the people may amend the constitution by the enactment of a statute. This prohibition on a constitutional amendment by initiative has been reaffirmed by the Alaska Supreme Court. *See State v. Lewis,* 559 P.2d 630, 639 (Alaska 1977) (stating "[t]he Alaska Constitution may not be amended by popular vote alone, without prior action by either the legislature or a constitutional convention"); *Starr v. Hagglund,* 374 P.2d 316, 317 n.2 (Alaska 1962) (noting that "[t]he initiative may be used only to enact laws, and not for the purpose of constitutional amendment. Alaska Const., art. XI and art. XII, § 11.").

We previously addressed an initiative seeking to limit the length of the regular session of the Alaska Legislature in November 1991. *See* 1991 Inf. Op. Att'y Gen. (Nov. 7; 663-91-0527). In that opinion, we recommended that you deny the application because the initiative, although presented as a statute, was in fact a constitutional amendment, which may not be enacted by initiative. The laws prohibiting the use of initiatives for amendments to the constitution have not changed since our 1991 opinion. There have been several decisions by the Alaska Supreme Court, however, refining the appropriate scope of pre-election review of initiative petitions. As a result, we must address not only whether this initiative constitutes an amendment to the constitution, but also whether, in light of these decisions, review of that issue is appropriate prior to placing the initiative on the ballot.

a. The initiative as an amendment.

If imposition of a 90-day limit on legislative sessions would, in fact, amend the Alaska Constitution, such a change cannot be enacted through an initiative. The section of the Alaska Constitution governing regular legislative sessions provides that:

> The legislature shall convene in regular session each year on the fourth Monday in January, but the month and day may be changed by law. The legislature shall adjourn from regular session no later than one hundred twenty consecutive calendar days from the date it convenes except that a regular session may be extended once for up to ten consecutive calendar days. An extension of the regular session requires the affirmative vote of at least two thirds of the membership of each house of the legislature. The legislature shall adopt as part of the uniform rules of procedure deadlines for scheduling session work not inconsistent with provisions controlling the length of the session.

Alaska Const., art. II, sec. 8. The second, third and fourth sentences of this provision were added by a constitutional amendment, effective December 30, 1984. (13th Legislature's SCS CSHJR 2 (1983)).

An argument can be made that reducing the maximum length of legislative sessions to 90 days does not clearly conflict with the constitution. A 90-day session would satisfy the requirement that the legislative session adjourn "no later than" 120 days from the date it convenes. On the other hand, an argument can be made that the intent of the drafters and language of the current provision governing legislative sessions supports the conclusion that the 90-day limit on legislative sessions necessarily amends the constitution.

There are arguments on both sides of the issue and a court has not had the opportunity to consider the merits of those arguments. The question remains, however, whether review of this issue should occur before or after the election.

b. The permissible scope of pre-election review.

Although a proposed amendment to the Alaska Constitution cannot be brought through the initiative process, the constitutionality of an initiative "may be reviewed either before it goes to the voters or after it is enacted." *Alaska Action Center, Inc. v. Municipality of Anchorage,* 84 P.3d 989, 992 (Alaska 2004). Pre-election review, however, is appropriate only for certain categories of challenges, the scope of which have been defined over time through Alaska Supreme Court decisions.

Prior to the Alaska Supreme Court's recent decision in *Trust the People,* the court divided challenges to initiatives into two categories to determine when review was proper. *Alaska Action,* 84 P.3d at 992. The first type of challenge invoked "the particular

constitutional and statutory provisions regulating initiatives." *Id.* (quoting *Brooks v. Wright*, 971 P.2d 1025, 1027 (Alaska 1999)). According to the court in *Alaska Action*, this first category, comprised of challenges based on the use of the initiative process itself, can be reviewed before the initiative is placed on the ballot. *Id.* at 992-93. The second category was comprised of challenges as to whether the underlying provisions of an initiative are unconstitutional. The court in *Alaska Action* held that this second category of challenge should not be brought until after the initiative goes before the electorate, unless controlling authority leaves no room for argument about its unconstitutionality. *Id.* at 992-93.

Under the analysis set forth in *Alaska Action*, the challenge to this initiative, which is a challenge to the use of the initiative process to amend the constitution, would appear to fall within the first category. This conclusion comports with our opinion in 1991, in which we advised against certifying an initiative limiting the legislative session to 90-days because the initiative was an unconstitutional use of the initiative process.

Since our previous opinion, and the decision in *Alaska Action*, however, the Alaska Supreme Court issued its decision in *Trust the People*, in which it narrowed the scope of pre-election review.[1] In *Trust the People*, the court held that pre-election review was inappropriate for a challenge asserting that the U.S. Constitution did not allow the proposed change to be brought by the initiative process. *Trust the People*, 2005 WL 1297915, at ** 10-14. The court specifically rejected the argument that pre-election review is appropriate whenever the issue is whether voters can enact the law by initiative. *Id.* at *12. The court explained that the category distinction that it set forth in *Alaska Action* "simply describes a baseline for pre-election review ..." *Id.* at *11. The court concluded that "pre-election judicial review may extend only to subject matter restrictions that arise from a provision of Alaska law that expressly addresses and restricts Alaska's constitutionally-established initiative process or to proposals that are clearly unlawful under controlling authority ..." *Trust the People*, 2005 WL 1297915, at *10. The court further explained that, "when an alleged subject-matter violation hinges on an implied constitutional restriction outside the specific restrictions enumerated in article XI, section 7 ... it is eligible for pre-election review only if it meets article XII, section 11's 'clearly inapplicable' test." *Id.* at 14.

Thus, the question in this case is whether pre-election review of an initiative that may constitute an amendment to the constitution remains appropriate after the decision in *Trust the People*. The proposed initiative does not violate the express restrictions enumerated in article XII, section 7. Therefore, under the analysis in *Trust the People*, it

[1] The court issued its opinion in *Trust the People* on May 27, 2005. Because it is so recent, the opinion has not been released for publication and remains subject to revision or withdrawal.

will be eligible for pre-election review only if other constitutional provisions make the process "clearly inapplicable." *Id.* at *11. In this case, the constitutional provision that could restrict this proposed initiative is article XI, section 1, which provides that the people may propose and enact *laws* by initiative. The court in *Trust the People* discussed two cases that challenged initiatives based on this provision, but reached conflicting conclusions regarding the propriety of pre-election review.

First, the court reaffirmed its decision in *Yute Air, Inc. v. McAlpine,* 698 P.2d 1173 (Alaska 1985), in which the challengers argued that certain provisions of an initiative were a plebiscite rather than a law, and thus were not a proper subject for an initiative under article XI, section 1. *Id.* The court in *Trust the People* concluded that pre-election review was proper in *Yute Air* because the review was "limited to ascertaining whether an initiative is in compliance with constitutional provisions that regulate legislative enactment via initiative." *Id.* Under this analysis, pre-election review of any challenges based on the constitutional provision that restricts the use of initiative to the enactment of laws would seem to be appropriate.

In its discussion, however, of another case based on the same provision, *Alaskans for Legislative Reform v. State,* 887 P.2d 960 (Alaska 1994), the court reached a different conclusion. Specifically, the question was whether the Alaska Constitution allowed the use of the initiative process to establish term limits for state legislators or whether the proposed term limits could only be established by constitutional amendment. *Alaskans for Legislative Reform,* 887 P.2d at 962. After conducting pre-election review, the court concluded that a term-limit restriction would constitute a constitutional amendment and could not be brought through the initiative process. *Id.* at 966. In discussing *Alaskans for Legislative Reform,* the court in *Trust the People* indicated that pre-election review was not appropriate for this issue, stating, "to the extent *Alaskans for Legislative Reform* supports pre-election review of claims that a term limits initiative is unconstitutional, it appears to have been overruled by *Kodiak Island Borough v. Mahoney,* where we declined to allow pre-election review of a term-limits proposal."[2] *Id.* at 13.

Because the court's conclusions regarding these cases appear to conflict, it is not clear as to how the court would rule regarding the propriety of pre-election review of this initiative. According to the decision in *Trust the People,* pre-election review of this

[2] The challenge to the initiative in *Mahoney* was not based on the argument that a term limit initiative could not be brought because it was an amendment to the constitution and in violation of the constitutional restrictions on initiatives. *Kodiak Island Borough v. Mahoney,* 71 P.3d 896 (Alaska 2003). Instead, the challenge was based on the authority under a municipal initiative statute for a clerk to deny a petition on the basis that it would not be enforceable as a matter of law – a question that relates to general contentions as to the initiative's constitutionality, not whether it can properly be brought as an initiative. *Id.* at 900-01. The court in *Trust the People* did not recognize this distinction. As a result, the overruling of *Alaskans for Legislative Reform* may be limited to the issue of pre-election review of term limits.

initiative is only appropriate if the restriction on initiatives under article XI, section 1 makes the process "clearly inapplicable." Given the overall approach of the court to narrow and restrict pre-election review, it appears that it intended the "clearly inapplicable" rule to be a stringent standard. In this case, there is a valid dispute as to whether this initiative would constitute a constitutional amendment. In addition, the Alaska Supreme Court expressly overruled pre-election review of a challenge based on the same argument that is at issue here – whether the initiative constitutes a constitutional amendment.

We believe that this is a close call. Although the proposed initiative to limit the legislative session to 90 days may constitute an amendment to the constitution, the key issue is whether it is appropriate to make that evaluation prior to an election. The usual rule is to construe voter initiatives broadly so as to preserve them whenever possible. *Boucher v. Engstrom,* 528 P.2d 456, 462 (Alaska 1974). Nevertheless, this rule must be balanced against the expense and time required to conduct an election that ultimately will prove futile. *Whitson v. Anchorage,* 608 P.2d 759, 762 (Alaska 1980).

On balance, given the Alaska Supreme Court's ruling in *Trust the People,* we recommend that you certify the initiative petition.

III. PROPOSED BALLOT AND PETITION SUMMARY

We also have prepared a ballot-ready petition summary and title for your consideration. It is our practice to provide you with a proposed title and summary to assist you in complying with AS 15.45.090(2) and AS 15.45.180. We believe that it is good practice for the petition and ballot to conform to the requirements of a title (six words) and ballot summary (100 words) under AS 15.45.180. We do this in order to reduce the chance of collateral attack due to a divergence between the ballot and petition summaries. We therefore propose the following ballot and petition title and summary for your review:

Initiative for 90-day Legislative Session

> This initiative would reduce the maximum length of regular legislative sessions from 120 days to 90 days.
>
> Should this initiative become law?

This summary has a Flesch test score of 50.239, which is close to the target readability score of 60. We believe this summary meets the readability standards of AS 15.60.005.

IV. CONCLUSION

For the reasons set out above, we recommend that you certify this initiative and so notify the initiative committee. Preparation of the petitions may then commence in accordance with AS 15.45.090.

Please contact me if we can be of further assistance to you on this matter.

cc: